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Supreme Court of the United States

OCTOBER TERM, 1937.

Nos. 773-774-775.

AETNA INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

UNION MARINE & GENERAL INSURANCE COMPANY, LTD.,
formerly Union Marine Insurance Company, Ltd.,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BOSTON INSURANCE COMPANY,
Petitioner,
against
UNITED FRUIT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

CHARLES EVANS HUGHES,
EDWARD KENNARD,
Counsel for Respondent.

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The respondent, United Fruit Company, opposes the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit entered

November 15, 1937, reversing in part and affirming in part judgments of the Southern District of New York. R. 113, 127 and 141. The effect of the judgment of the Circuit Court of Appeals is to dismiss three complaints at common law by Marine Underwriters against their assured, the respondent, for the recovery of certain monies by way of subrogation.

Jurisdiction.

The decree on mandate went down November 30, 1937. Jurisdiction is provided by 28 U. S. C., s. 347 (a).

Opinions Below.

The unanimous opinion of the Circuit Court of Appeals (L. Hand, writing, Swan, A. N. Hand) is printed at page 163 of the record and is reported 92 F. (2d) 576; 1938 A. M. C. 22.

The opinion of District Judge Patterson is printed at page 100 of the record and is reported 18 F. Supp. 441; 1937 A. M. C. 78.

Questions Presented.

The petition presents three consolidated actions at law brought by Marine Underwriters against their assured, United Fruit Company, for *additional payments* by way of subrogation out of funds recovered from the United States for the loss of the insured vessel, the *Almirante*.

Respondent, before suit, had paid each Underwriter the amount of the loss it had paid on its policy, less a proper share of the expense of recovery from the United States, without interest, because no interest was recovered from the United States. The Court below approved this adjustment as fair and equitable and in accord with the settled insurance practice.

Petitioners claim that because there was an agreed valuation clause in the policy they are entitled to recover interest on their payments and to be relieved of the payment of legal expenses for their own lawyers.

They appear to have abandoned their additional claim to the profit which recovery of the whole fund would give them.

The Facts.

Although the facts in this case have been stipulated, the statement of the facts contained in the petition does not accurately reflect the contents of the record.

On May 1, 1918 the United Fruit Company took out a number of policies on its *S. S. Almirante* with American and British Underwriters.

The policies were unusual. The usual form of policy issued by the various underwriters was entirely supplanted by a special printed rider, which was prepared solely for the coverage of respondent's vessels.

Such rider contained a valuation clause in the amount of $632,610. As the petition discloses, the printed rider contained many clauses not contained in the usual policy.

Each of the petitioners assumed part of American insurance placed, amounting to $284,673. The English Hull insurance amounted to $297,329.25.

The Fruit Company paid a substantial premium for this insurance.

In addition, in order to cover disbursements and other miscellaneous losses which an owner always incurs in connection with a total loss of a ship, such as loss of freight and future earnings, disruption of business, etc., and which are not taken care of by a recovery of any part of the value of a ship, the United Fruit Company took out with English underwriters, "P. P. I."[1] policies amounting to $173,945.25.[2]

In addition, the respondents took out English "P. P. I." policies on the increase value of hull and machinery amounting to $141,614.

The *Almirante* was lost in a collision with the *S.S. Hisko,* owned by the United States, on September 6, 1918. The insurance companies paid the respondent the face value of their policies for the total loss. Thereafter the Hull Underwriters, including the petitioners, and the United Fruit Company *jointly* retained attorneys to prosecute the claim for damages occasioned by the loss of the *S.S. Almirante* against the United States of America. After the passage of

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[1] These letters stand for Policy Proof of Interest.

[2]

"Disbursements and Excess Liabilities" (Exhibit 2, R. 66, 2 pages, attached Stipulation, Plaintiffs' Exhibit 1, R. 59)	£27,740
"Freight" (Exhibit 3, R. 68, 2 pages, attached Stipulation, Plaintiffs' Exhibit 1, R. 59)	£ 5,625
"Disbursements" (Exhibit 4, R. 70, 2 pages, attached Stipulation, Plaintiffs' Exhibit 1, R. 59)	£ 2,500
	£35,865
@ $4.85	$173,945.25

a Special Act and extended litigation, the attorneys retained *jointly* by the petitioners and respondent recovered $1,761,693.02 as the actual value of the *S.S. Almirante* and her equipment at the time of the loss. No interest was recovered from the United States. Reasonable legal and other expenses amounted to $300,024.33.

In accordance with the usual custom, Messrs. Johnson & Higgins were employed to prepare a Recovery Statement, Exhibit 9. In accordance with this Statement, the attorneys acting jointly for the petitioners and respondent paid each insurance company the amount it had paid on its policy, less a proportionate share of legal expenses incurred by the insurance company and without any payment of interest, because no interest was recovered from the United States.

Each Hull underwriter, including the petitioners, received exactly the amount it paid in 1918, less the exact cost paid to their own attorneys for collecting the sum from the United States. Neither the Hull underwriters nor the United Fruit Company received any interest, because no interest was recovered, and consequently there was no interest for the attorneys or Fruit Company to account for.

The precise situation, therefore, with respect to the Fruit Company's loss of the vessel and recovery from underwriters and the United States was as follows:

Value of Vessel September 6, 1918 (Ex. 9, p. 27)			$1,750,000.00
Paid by American Hull Underwriters		$284,673.00	
Paid by British Hull Underwriters £61,305 @ $4.75¾ (Supplemental Stipulation, par. 3, Plaintiffs' Exhibit 5, f. 265)		$291,658.53	
Paid by English P.P.I. Underwriters, Increased Value Hull and Machinery, £29,240 @ $4.75¾ (Supplemental Stipulation, par. 3, Exhibit 1, R. 64, attached to original Stipulation). Plaintiffs' Exhibit 5, f. 265		$139,109.30	
Recovered from United States for owners	$976,288.10		
Less Recovery for interests other than Hull	13,013.38	963,274.72	
Total received by Fruit Company for Hull			$1,678,715.55
Net Loss of Fruit Company on whole transaction, without taking into account interest or premiums paid underwriters[1]			$ 71,284.45

[1] Plaintiffs' calculation of owners' loss not only ignores premiums paid by owners and interest lost by owners but includes as a recovery for hull, certain insurance on risks other than hull. This is apparent from examination of the policies. See f. n. 2, page 4, *supra*.

It is obvious, therefore, that the respondent shipowner has suffered a loss of a large amount, for which it is unindemnified.

The petitioners, insurance companies, seek to recover from the owner large amounts which will greatly increase the loss suffered by the insured respondent.

Reasons for Opposing the Petition.

1. The petition presents the question of the construction of a special Hull policy written before the Spring of 1918. As the petition indicates by the quotation of a number of unusual terms of the policy, the policy was not a regular policy used by underwriters generally, but was a special form prepared by an insurance adjuster for the coverage of respondent's vessels. The interpretation of such an ancient document by this Court would serve no useful purpose.

Underwriters ordinarily write their own policies and are well able to make such a contract as they choose to cover the circumstances of a case such as this.

If they do not like the present decision they have only to change the wording of their policies which they have done many times since 1918.

There have been only two cases in the history of American and British Maritime Law where there has been a recovery from a tort feasor in excess of agreed valuation, and both of these cases were in the Second Circuit. The first was *The Livingstone,* 130 Fed. 746; the second is this case. The decision below, therefore, involves an obscure question of marine insurance so rare as to be almost academic.

The petitioners admit that there are no other cases involving similar facts. It is apparent, therefore, that their allegation of conflict is without merit. All of the cases referred to by the petitioners are *partial loss cases*. The law of those cases is not affected by this decision, which is carefully confined to cases of *total loss* where the recovery is in excess of the agreed valuation.

The petition, therefore, fails to state any ground for granting certiorari. The question of the proper rule in partial loss cases may come before the Court on some other occasion. Such question is not presented on this record, and all of the decisions cited in the petitioners' brief are on an issue not here present.

Petitioners' brief is based almost entirely on a decision of the Southern District of New York. *International Navigation Co.* v. *Atlantic Mutual Ins. Co.*, 100 Fed. 304.

The inapplicability of that decision to the facts presented by this case has been twice pointed out by the Circuit Court of Appeals for the Second Circuit. The correctness of the decision of the District Court in that case has been doubted by the Circuit Court of Appeals and inferentially questioned by this Court in *Gulf Refining Co.* v. *The Atlantic Mutual Ins. Co.*, 279 U. S. 708.

Petitioners in this case are underwriters who received a substantial premium from the respondent, their assured, for promising indemnity to the assured. A loss occurred and the respondent has suffered damage for which it has never at any time been fully indemnified. The underwriters seek to increase the loss suffered by the insured by recovering interest which the assured never received and by recovering from the assured legal expenses which the petitioners incurred by retaining their own counsel. The claim

of the petitioners is contrary to the repeated decisions of this Court that the *assured* is to be first indemnified, and not the underwriters.

It is submitted that the opinion below was correct and in accord with general marine insurance practice. The insurance policy is obsolete and, the circumstances, in any event, highly unusual. It is respectfully submitted that there is no occasion for the review of the decision of the Circuit Court of Appeals.

Respectfully submitted,

CLETUS KEATING,
RICHARD SULLIVAN,
Counsel for Respondent.

Dated: March 1, 1938, New York, N. Y.